KETUA PENGARAH HASIL DALAM NEGERI *a*

v.

DAMANSARA JAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
KC VOHRAH J
[TAX APPEAL NO: R1-14-4-96]
9 MARCH 1999

CIVIL PROCEDURE: *Costs - Review - Getting-up fee - Amount allowed by Senior Assistant Registrar - Whether excessive - Whether all relevant circumstances considered - Whether point of law required specialised knowledge - Whether work undertaken before appellate court less strenuous than at 1st instance* *c*

CIVIL PROCEDURE: *Costs - Bank guarantee charges - Bank guarantee provided to Director-General of Inland Revenue in lieu of payment of tax pending appeal - Appeal dismissed - Whether Director-General liable for charges thereof - Whether Director-General had power to allow for a bank guarantee* *d*

The appellant, the Director-General of Inland Revenue ('DG') appealed to the High Court as he was dissatisfied with the decision of the Special Commissioners of Income Tax made in favour of the respondent company ('the company'). The Special Commissioners had allowed the appeal by the company against the additional assessment of income tax imposed by the DG. The High Court held the decision of the Special Commissioners was correct in law and dismissed the appeal by the DG with costs. The bill of costs of the company was submitted to the Senior Assistant Registrar ('SAR') for taxation. Both parties herein were dissatisfied with the SAR's award on the getting-up fee. Hence the instant application for review of the said award. The DG also objected to the charges claimed by the company and allowed by the SAR in respect of a bank guarantee. The bank guarantee was provided to the DG *in lieu* of payment of tax pending the appeal to the High Court. *e* *f* *g*

The DG argued that the amount awarded for the getting-up fee was excessive and that there was only one issue before the High Court and it was not a novel one. The company argued that the issue required specialised knowledge and many authorities were perused and prepared for citing before the court. Also various documents were examined. However, the company did not agree with the SAR that the work undertaken before the High Court was less strenuous in view of preparatory work undertaken before the Special Commissioners. In relation to the bank guarantee, the company argued that *h* *i*

the DG should bear the cost of the charges paid on the bank guarantee as he had lost the appeal to the High Court.

Held:

[1] The costs to be awarded for the getting-up fee under items 26 and 27 Part IV Appendix 1 to O. 59 RHC are at the discretion of the registrar. The SAR shall have regard to all relevant circumstances, in particular, those set out under para 1(2) of Part X of Appendix 1. In this case, the reasons given by the SAR in awarding the said getting-up fee showed that he had considered all relevant circumstances.

[2] Although there is a *prima facie* rule that counsel's fee for work done should be the same in the appeal court as at 1st instance, there are many exceptions to it. If the taxing master finds that there are valid grounds for regarding that the work done is of less value in the court of appeal than in the court below, it is open to him, and within his discretion, to proceed accordingly.

[2a] The SAR had rightly decided that the company was not entitled to costs for the proceedings before the Special Commissioners. He did take into account the work done for the review in the High Court and found as a fact that the effort put in the work before the High Court was less strenuous.

[3] The SAR did give recognition to the fact that the amount involved in the dispute was a large amount. It was one of the circumstances which he took into account. He had pointed that although the point of law was not a novel one, it did require specialised knowledge.

[3a] The SAR did not proceed on wrong principles when he awarded the said getting-up fee on the merits of the case. Also, the award of RM40,000 was not inordinately excessive.

[4] The Special Commissioners have no power to award costs after deciding on the appeal. The costs awarded by the High Court must be in relation to proceedings in the High Court and not in relation to proceedings before the Special Commissioners. The fact that an appeal had been pursued before the High Court did not entitle the winning party to claim as of right what could not be claimed before the Special Commissioners.

[4a] In any event, the DG has no power to allow for a bank guarantee to be given to secure payment of the additional tax. The DG has power to allow partial payments of tax until the whole amount is paid.

[4b] A bank guarantee is certainly not an instalment payment, let alone a payment. The DG had granted the company an indulgence not sanctioned by the Act. It followed that the SAR was in error for allowing the expenses incurred for securing the bank guarantee as part of the company's costs.

[Getting-up fee at RM40,000 affirmed; bank guarantee charges disallowed.]

Case(s) referred to:

Pang Kok v. Leong Fock Hap & Anor [1996] 4 MLJ 97 ***(refd)***

Property & Reversionary Investment Corporation Ltd v. Secretary of State of the Environment [1975] 2 All ER 436 ***(refd)***

Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1997] 1 CLJ 463 ***(refd)***

Sunnucks v. Smith [1950] 1 All ER 55 ***(refd)***

United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd [1991] 3 MLJ 181 ***(refd)***

Yii Suok Ting v. Sibu Municipal Council [1995] 4 CLJ 108 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 4(a), 22(2)(b), 103(1), (3), para 34 sch 5

Real Property Gains Tax Act 1976, s. 123

Rules of the High Court 1980, O. 59 r. 1(1), App 1 Part IV items 26 & 27

Solicitors' Remuneration Order 1972 [Eng], art. 2

Other source(s) referred to:

Ventkataraiya's Law Lexicon with Legal Maxims, vol 1, 2nd edn,

For the appellant - Salmah Kasim (Noor Kamaliah with her)

For the respondent - PS Gill (Sarjeet Singh with him); M/s Gill & Tang

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

Decision

The Director-General of Inland Revenue (the DG) was dissatisfied with the decision of the Special Commissioners of Income Tax which was made in favour of Damansara Jaya Sendirian Bhd (the company). At the request of the DG, under para. 34 of sch. 5 to the Income Tax Act 1967 (the Act), the Special Commissioners stated a case to the High Court for judicial review. The High Court held that the decision of the Special Commissioners is correct in law and dismissed the appeal with costs.

The bill of costs of the company was submitted to the Senior Assistant Registrar ('SAR') for taxation and after he had decided on the matter there was an application for the review of his decision. After the review both the DG and the company applied to a judge in person for a review of his award on the getting-up fee. The DG has, additionally, objected to the allowance of expenses incurred by the company in securing a bank guarantee which was given to the DG *in lieu* of payment of an additional tax.

Before I deal with the review let me briefly deal with the salient features of the case stated.

Nature Of Case

Several parcels of land in Sungai Buluh were transferred to Damansara Jaya Sdn Bhd (the company) in 1974. One of the parcels, comprising 365.125 acres under G 5486 Lot 70, was compulsorily acquired by the Federal Government in September 1980 and with the compensation made for this acquisition there was a gain over the purchase price which came to RM18,299,665.

In 1982 the company filed a notification under s. 123 of the Real Property Gains Tax 1976 with the DG of Inland Revenue on the disposal of the property. On 11 September 1982 the DG informed the company that the gain on the compulsory acquisition of the said property is not liable to Real Property Gains Tax but is exigible to income tax.

On 19 November 1983 the DG made an additional assessment against the Company for the Year of Assessment 1982 amounting to RM8,576,067.95 under the Income Tax Act 1967 as a result of treating as income the surplus of RM18,299,665.

The company disputed the additional assessment and appealed against it to the Special Commissioners of Income Tax. The question for determination was whether the compensation for the compulsory acquisition of the land which resulted in a gain of RM18,299,665 to the company amounts to income from a business under s. 4(a) or s. 22(2)(b) of the Act. The Special Commissioners on 26 June 1995 decided that the compensation does not amount to income from a business under s. 4(a) or s. 22(2)(b) of the Act and allowed the appeal.

The DG by a notice required the Commissioners to state a case for the opinion of the High Court pursuant to para. 34 of sch. 5 to the Act and the case was so stated for the opinion of the High Court.

After argument on the case Abdul Kadir bin Sulaiman J held that the decision of the Special Commissioners was correct in law and dismissed the appeal with costs.

Both the DG and the company are dissatisfied with the decision of the SAR on the amount allowed under item 26, Part IV, Appendix 1 (scale of costs) to O. 59. This relates to the amount given for the getting up fee. The DG, in addition, is dissatisfied that the SAR allowed an amount claimed by the company in respect of charges paid to Standard Chartered Bank which provided a bank guarantee to the DG *in lieu* of payment of an additional assessment under s. 103(3) pending the outcome of the appeal against the increased assessment.

The Getting-up Fee

Part IV, Appendix 1 to O. 59 provides a list of matters to be considered on the getting-up fee comprised in the item 25 and 26 of Part IV. In a note to these tax items, it is stated that these items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for trial, hearing or appeal, or before a settlement of the matters in dispute. The work includes:

(a) taking instructions to sue, defend, counterclaim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under O. 70 r. 29;

(b) considering the facts of law;

(c) attending on and corresponding with client;

(d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;

(e) arranging to obtain reports or advice from experts and plans, photographs and models:

(f) making search in a government office and elsewhere for relevant documents;

(g) inspecting any property or place material to the proceedings;

(h) perusing pleadings, affidavits and other relevant documents;

(i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement: and

(j) the general care and conduct of the proceedings.

For the getting-up fee under items 26 and 27 the costs to be awarded are at the discretion of the registrar. And in regard to discretionary costs, the SAR, shall have regard to all relevant circumstances in particular those set out under para. 1(2) of Part X of Appendix 1 which is as follows:

(2) In exercising his discretion under this paragraph or under r. 31(2) in relation to any item, the registrar shall have regard to all relevant circumstances, and in particular to:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value; and

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items had reduced the work which would otherwise have been necessary in relation to the item in question.

It is instructive to see how these matters were considered in *Property & Reversionary Investment Corporation Ltd v. Secretary of State of the Environment* [1975] 2 All ER 436 see 442. The matters therein considered arose under art. 2 of the Solicitors' Remuneration Order 1972 which is substantially similar to our Part X of Appendix 1. The SAR in our case in exercising his discretion for the getting-up (item 26) has given his reasons for this decision and I reproduce the circumstances which he took into account (translated from Bahasa Malaysia):

1.1. **The Difficulty Of This Case**. The main issue in this case is not that difficult and novel. The question as to whether profit from an income arising from a compensation of acquisition of land is subject to tax pursuant to the Income Tax Act 1967 or not had been settled in several local cases and it is an established legal principle which has been cited in the case of *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713.

1.2. **Skill, Specialised Knowledge, Time, Labour And Responsibility Of The Solicitor**. I cannot deny that certain amount of skill and specialised knowledge is required by the solicitor in this case. A lot of time and labour by both solicitors had been spent. But, it should borne in mind that this case is only for review against the decision

made by Special Commissioners and there were more strenuous efforts exerted during the hearing before the Special Commissioners. The review before the High Court is just by way of a rehearing only.

1.3. **Documents**. It is argued by the respondent that the respondent's solicitor had to revise lengthy and thick documents. In my opinion, the documents had to be perused during the hearing before the Special Commissioners and it was not so in the High Court.

1.4. **The Importance Of The Case To The Client**. It cannot be denied that this case is very important to both parties. Therefore a reasonable sum should be awarded without severely penalising the other party.

1.5. **The Amount Of Money Involved In This Case**. The amount of money involved is very large. The getting-up fee should not be unduly inflated if the amount is high. The factor should be considered together with the actual work done. If the amount of money involved is very high and the work done is very little, the getting up fee should be a reasonable sum.

2. In this review, the learned High Court Judge had decided the legal issue by way of case stated compared to the appeal before the Special Commissioners whereby witnesses were examined and documents/exhibits were tendered. Therefore, the cost in the High Court should be lesser than the cost before the Special Commissioners.

3. For the question raised as to whether the High Court has discretion to award costs of proceeding before the Special Commissioners or not, I am of the opinion that the High Court can only tax the cost for proceeding in the High Court only. This is supported by the decision of the learned High Court Judge whereby he dismissed the appeal with costs without giving any order as to cost for the proceeding before the Special Commissioners.

From the above, I am of the opinion that the sum of RM40,000 for getting up is reasonable.

I have set out in full the reasons which the SAR gave for awarding the getting-up at RM40,000. It will be seen that the SAR had in mind when considering the getting-up for the work done many of the matters listed in the note to items 26 and 27, Part IV, Appendix 1. He co-related these matters to the circumstances which he had to consider, especially those set out in sub-paras. (a), (b), (c), (e) and (f) of para. 2 of Part X. Counsel for the DG did not really dispute the reasons taken by the SAR for his award; she argued that the amount awarded is excessive. She argued that there was only one issue before the High Court and that too not a novel one before the High Court in the case stated unlike the case of *Yii Suok Ting v. Sibu Municipal Council*

[1995] 4 CLJ 108, where there were several issues in a review by way of *certiorari* before the High Court in Sibu. They were difficult and involved complicated points of law (as held by the learned judge) and the getting-up fee was revised upwards but fixed at only RM30,000. The point is that the complexity of the subject matter is merely one of the many circumstances that has to be taken into account and the SAR took many circumstances, those listed in para. 1(2) of Part X of Appendix 1 into account. And the final sum is as a result of a consideration of all relevant circumstances.

Counsel for the company argued the issue required specialised knowledge and many authorities had to be perused and prepared for citing while various documents had to be gone into to show that the evidence supported the finding of the Special Commissioners. These circumstances were not really missed by the SAR. Counsel, however, argued that it was wrong for the SAR to say that preparatory work had been undertaken before the special commissioners and therefore the work undertaken before the High Court was less strenuous and he says that there is a rule that counsel's fee (for work done) should be the same in the appeal court as at first instance as a general rule. He relied on *Sunnucks v. Smith* [1950] 1 All ER 55 but as was pointed in the case although there is such a *prima facie* rule there are many exceptions to it and if the taxing master finds there are valid grounds for regarding that the work done is of less value in the Court of Appeal than in the court below, it is open to him, and it is within his discretion, to proceed accordingly. Our Court of Appeal in *Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1997] 1 CLJ 463 at 470 in ordering getting-up fees for various counsel for the winning parties ordered all other costs in the High Court be taxed by the losing parties and remarked that the costs in the High Court should be higher because the efforts would have been more strenuous:

> But when it comes to O. 59 Appendix 1, Part IV, Item 26, the Registrar should have regard to what we have done here as a guide to how the getting up fee and advocacy before the trial Judge should be inter-related. We do not think it right that we should make a gross award for the High Court costs without giving the parties a reasonable opportunity of clarifying the respective roles they played in the Court below where there were other issues which were canvassed other than the single question as to whether the petition disclosed a cause of action. In any event, those costs should be higher than what we have awarded here because the efforts would have been more strenuous.

ln the present case the SAR has rightly decided the company is not entitled to costs for the proceedings before the Special Commissioners. He did, however, take into account that the work done before the Special Commissioners as against the work done for the review in the High Court and he found it as a fact, and I have no reason to disagree with him, bearing

in mind the overlapping reasons he advanced in paras. 1.3, 1.5 and 2 in his decision that the effort put in the work before the High Court was less strenuous.

Counsel for the company has pointed out that the amount involved in the dispute is a large amount. It has to be noted that the SAR did give recognition to this fact but it is again of one of the circumstances which he took into account. The point of law as pointed out by the SAR was not a novel one but it did require specialised knowledge. It would be wrong to unduly inflate a getting up fee by tying it to a formula which involves a certain percentage or proportion of the amount in dispute or quantum awarded (see the *dicta* of Abdul Malik Ishak J in *Pang Kok v. Leong Fock Hap & Anor* [1996] 4 MLJ 97 at 101 with which I agree.) In the *Property & Reversionary Investment Corporation Ltd* case, earlier referred to, at 441, Donaldson J (as he then was) observed on the difficult matter of assessment as follows:

> It is an exercise in assessment, an exercise in balanced judgment – not an arithmetical calculation. I follows that different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

I do not see the SAR proceeding on wrong principles when he exercised his discretion in awarding RM40,000 for the getting-up on the merits of the case. He has not erred on a question of principle nor failed to consider some relevant considerations and there can be no reason for me to interfere (see *United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181). If at all he erred the SAR erred on the generous side but the award was not inordinately excessive as to show he acted on a wrong principle and I do not propose to interfere with the amount.

Bank Guarantee Charges

In regard to the award of RM820,849.51 which the SAR called re-imbursement of the fees incurred for securing a bank guarantee which the DG has objected to, it is necessary to show how the bank guarantee came into the picture.

As was pointed out earlier, on 19 November 1983, the DG made an additional assessment against the company for the year of assessment 1982 amounting to RM8,576,067.75 under the Act. The notice of assessment was served on the company. Under s. 103(1) of the Act the "tax payable under an assessment shall on service of the notice of assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment".

The company appealed to the Special Commissioners on the additional assessment. Instead of a lump sum payment or payment by installments, the DG, at the request of the company, agreed to withhold collection of the said sum subject to a security being furnished to the satisfaction of the DG. The Chartered Bank provided a guarantee to the DG for the payment of the sum pending the outcome of the appeal and that guarantee was renewed from time to time till the outcome of the appeal.

It is stated in s. 103(3) that where "any tax is payable ... the Director-General may allow the tax to be paid by instalments in such amount and on such dates as he may determine."

Counsel for the company argued that since 103(3) states that the DG may allow the tax to be paid "by instalments" on "such dates as he may determine" the DG is empowered to fix the date when the tax has to be paid.

Counsel for the company argued that the DG who lost the appeal was ordered to pay the cost by the High Court and the DG should therefore bear the cost of the charges paid on the bank guarantee. Since O. 59 r. 1(1) of the RHC 1980 defines "costs" to include "fees, charges, disbursement, expenses and remuneration" the company is entitled to claim all expenses incidental to the review by the High Court. It was argued that the word "expense" in the definition of "costs" in the light of the definition of *Ventkataraiya's Law Lexicon with Legal Maxims*, vol 1, 2nd edn., which gives it quite a general meaning, is wide enough to cover any expenditure by the tax payer whether made as a condition of contract; the definition is wide enough to cover expenditure for the guarantee to secure payment of the additional assessment and therefore the expenses for the bank guarantee are legitimate costs that can be given.

It will be noted that statutorily the Special Commissioners have no power to award costs after deciding on the appeal. The costs awarded by the High Court must therefore be in relation to the proceeding in the High Court, not in relation to the proceeding before the Special Commissioners. The fact that an appeal had been pursued before the High Court cannot bring into existence for the winning party as a right what could not be claimed as a right before the Special Commissioners, even assuming that the DG had power to allow for a bank guarantee to be given to secure payment of the additional tax. In any event the DG has no such power. The DG has power if the full amount of the tax is not paid in one lump sum to allow partial payments until the whole amount is paid and the partial payments may be made on such dates as he may determine. A bank guarantee is certainly not an instalment payment let alone a payment. The DG in this case had granted the company an indulgence not sanctioned by the Act.

Coming back to the SAR's decision to allow the expenses incurred for securing the bank guarantee amounting to RM820,849.51, the SAR was therefore in error when he allowed the amount as part of the company's costs.

In the result I affirm the getting-up fee at RM40,000 (item 65 in the bill of costs) and I disallow the bank guarantee charges of RM820,849.51 (item 64 in the bill). No order as to costs.